Supreme Court, U.S.
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No. 97-1310

In The

Supreme Court of the United States

October Term, 1997

RICHARD MARK CUTCLIFFE, VICKI CUTCLIFFE, GEORGE RAGGIO, JR. and CAROLE RAGGIO,

Petitioners,

vs.

KEN JENNE, as Sheriff of Broward County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition raises any issues of sufficient public importance to warrant review by the United States Supreme Court where the challenged decisions of the Circuit Court of Appeal have been mooted by subsequent state legislation.

2. Whether the decisions of the Eleventh Circuit in *Terry v. Cook* and this case are at odds with this Court's decisions in *Elrod v. Burns* and *Branti v. Finkel.*

3. Whether the Circuit Courts of Appeal have rendered conflicting opinions, warranting review by this Court, regarding the application of the principles espoused in *Elrod* and *Branti* to deputy sheriffs employed in different states.

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STATEMENT OF THE CASE

Petitioners were formerly employed as deputy sheriffs by Respondent's predecessor Sheriff Nick Navarro. Petitioners asserted claims below pursuant to 42 U.S.C. § 1983, alleging that they were unlawfully terminated following the election of Respondent, Sheriff Ron Cochran, because of their political affiliation with Sheriff Navarro.

Following discovery, Sheriff Cochran filed a motion for summary judgment. Following oral arguments before United States District Judge Wilkie Ferguson, an order was entered granting Sheriff Cochran's motion and entering judgment in Sheriff Cochran's favor. In his order, Judge Ferguson held that deputy sheriffs in Florida are among those employees falling into the exception, established in this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), to the general rule prohibiting political patronage terminations. Judge Ferguson's ruling was grounded on his finding that the Eleventh Circuit's decision in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), which held that deputy sheriffs in Alabama are subject to political patronage dismissal under *Elrod & Branti*, is applicable to deputy sheriffs in Florida.

Petitioners appealed Judge Ferguson's ruling, which was affirmed by the Eleventh Circuit Court of Appeals. Petitioners then sought rehearing *en banc*, asserting that the Eleventh Circuit's decision in *Terry v. Cook* is at odds with *Elrod* and *Branti*. The Eleventh Circuit denied rehearing *en banc*, and Petitioners subsequently filed this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED IN THE PETITION DO NOT REQUIRE OR WARRANT REVIEW BY THE SUPREME COURT.

Petitioners argue that this Court should review the decision of the Eleventh Circuit below for two reasons. First, Petitioners contend that *Terry v. Cook*, the decision relied upon by the Eleventh Circuit in this case, is contrary to this Court's decisions in *Elrod* and *Branti*. Second, Petitioners assert that the Circuit Courts of Appeal are in conflict with regard to the application of the rules promulgated in *Elrod* and *Branti* to the position of deputy sheriff.

In the sections that follow, Respondent will demonstrate that both of these contentions are incorrect. However, before the merits of these issues are addressed in detail, a more fundamental question should be posed; whether these issues, even if genuine, warrant review by this Court.

In this regard, the following pronouncement addressing the question of when petitions for writ of certiorari should be granted is instructive:

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.[1]

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1. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 43 S. Ct. 422, 423, 261 U.S. 387, 393 (1923).

The threshold requirement of a question of public importance is lacking here because the decisions in *Terry v. Cook* and this case have been mooted, respectively, by legislation enacted in both Alabama and Florida in 1995 that prohibit political patronage dismissals.[2] As a result of this legislation, a review of *Terry v. Cook* and the Eleventh Circuit's decision below would not obviate future litigation relating to political patronage dismissals in either Alabama or Florida, nor would it serve any other public purpose.[3]

Therefore, even if the court agrees with Senior District Judge Harris' suggestion that the "subject matter" of political patronage dismissals "cries out for elucidation from the Supreme Court in some appropriate future case," it is apparent that this is not that case.

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2. Alabama Statutes, Section 17-1-7 prohibits actions against state, county and city employees that result in a denial of the right to participate in political activities "to the same extent as any other citizen of the state of Alabama."

Florida Statute 30.078 provides that:

> When a newly elected or appointed sheriff assumes office, the incoming sheriff may not terminate the employment of any deputy sheriff . . . for lawful off-duty political activity or for a discriminatory reason. The incoming sheriff may replace deputy sheriffs assigned to managerial, confidential, or policymaking positions or part-time deputy sheriffs.

3. Neither the decision in *Terry v. Cook* nor the decision below addressed the question of whether deputy sheriffs in Georgia are subject to political patronage dismissal under *Elrod* and *Branti*. This case, therefore, is not an appropriate vehicle for review of the that question.

II.

THE ELEVENTH CIRCUIT'S POLITICAL PATRONAGE DECISIONS ARE CONSISTENT WITH THE DECISIONS IN *ELROD* AND *BRANTI*.

Petitioners assert that the Eleventh Circuit, in both *Terry v. Cook* and this case below, misapplied *Elrod* and *Branti* by failing to engage in an "individual determination" of whether party affiliation is an appropriate requirement for the continued employment of each individual deputy. In fact, it is Petitioners, rather than the Eleventh Circuit, who have misread *Elrod* and *Branti*.

The distinction between the Petitioner's interpretation of the rule articulated in *Elrod* and *Branti* and the actual rule is subtle, but critical. Petitioners suggest that *Elrod* and *Branti* require a review of the duties performed by *each employee* before a court can ratify a decision to terminate their employment on political patronage grounds. This is not a correct reading of these cases because the inquiry contemplated in *Elrod* and *Branti* is not this specific. Rather than addressing the duties performed by each employee, courts must determine whether *each public office* subjected to political patronage dismissal is of the type for which "party affiliation is an appropriate requirement."[4]

The correct analysis is best illustrated by the manner in which this court rendered its decision in *Branti*. There, this court was faced with the question of whether assistant public defenders in Rockland County, New York, could be terminated on political patronage grounds.[5] In answering this question in the negative, this court analyzed the duties inherent in the

4. *Branti*, 445 U.S. at 518.

5. *Id.* at 509.

position of assistant public defender in that jurisdiction, not the duties actually performed by the petitioners.[6]

The requirement of a position by position, rather than an employee by employee, review has been explicitly recognized by a number of Circuits. For example, in applying the *Elrod* and *Branti* rule, the First Circuit noted that "in conducting this inquiry, courts focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office."[7] Similarly, the Third Circuit has stated that "the relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved."[8] Finally, the Seventh Circuit has emphasized the importance of focusing on the position, rather than the individual employee, in noting that even

> if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political termination is his position inherently encompasses tasks that make his political affiliation an appropriate requirement for effective performance.[9]

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6. *Id.* at 1295.

7. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986).

8. *Brown v. Trench*, 787 F.2d 167, 168 (3rd Cir. 1986). It is notable that the Third Circuit, which is among those cited by Petitioners as opposing political terminations of deputy sheriffs, is nonetheless among those Circuits that have confirmed that these determinations are to be made upon a review of the duties of each position, rather than each employee in question.

9. *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985).

Thus, the Eleventh Circuit correctly applied *Elrod* and *Branti* in both *Terry v. Cook* and in this case below. In *Terry v. Cook*, the Court was faced with the question of whether party affiliation is an appropriate requirement for the position of deputy sheriff in Alabama. The court reviewed the nature of the position, rather than the duties performed by individual deputies, and found that:

> Under Alabama law, a deputy sheriff is the general agent of and empowered to enter into business transactions for the sheriff. Any transaction within the scope of the sheriff's duties may be acted upon by his deputy. The deputy sheriff is the alter ego of the sheriff, and the sheriff is civilly liable for actions committed by a deputy done in the performance of his duty.[10]

Based on this analysis of the nature of a deputy sheriff in Alabama, the Eleventh Circuit found that "the closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention."[11]

In this case, the question of whether the *Terry v. Cook* analysis of deputy sheriffs in Alabama is applicable to deputy sheriffs in Florida was raised. The district court reviewed the

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10. 866 F.2d at 377 (citations omitted).

11. *Id.* The court also found that the sheriff had not established that the positions of clerk, investigator, dispatcher, jailer and process server in Alabama involve responsibilities that subject them to political patronage termination, and noted that "such positions traditionally revolve around limited objectives and defined duties and do not require those holding them to function as the alter ego of the sheriff." *Id.* at 377-8.

nature of the position and found that "the relationship between a sheriff and his deputies under Florida law is almost identical to Alabama law."[12] As a result, the court found that the decision in *Terry v. Cook* could be extended to deputy sheriffs in Florida.

Thus, contrary to Petitioners' contention, in both *Terry v. Cook* and this case, the Eleventh Circuit sufficiently reviewed the nature of the positions of deputy sheriff in Florida and Alabama, and correctly applied the principles espoused in *Elrod* and *Branti*. Furthermore, as these decisions were dependent on reasonable interpretations of state law, this Court should leave the rulings undisturbed pursuant to the long-standing doctrine that this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals."[13]

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12. Order Granting Summary Judgment, at note 4, *citing* Fla. Stat. § 30.07 (1993).

13. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1301 n.13 (1986); *see also Regents of University of Michigan v. Ewing*, 106 S. Ct. 507, 513 n.10, 474 U.S. 214 (1985) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."); *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800, 472 U.S. 491, 500 (1985) ("Normally, the court defers to the constructions of a state statute by lower federal courts."); *Haring v. Prosise*, 103 S. Ct. 2368, 2373 n.8, 462 U.S. 306, 314 n.8 (1983) ("it is our practice to accept a reasonable construction of state law by the court of appeals.").

III.

THE PURPORTED CONFLICT BETWEEN THE CIRCUITS IS AN ILLUSION.

Petitioners next argue that this Court should review the Eleventh Circuit's decision below because the Circuit Courts of Appeal are divided on the issue of whether deputy sheriffs can, under *Elrod* and *Branti*, be subjected to political patronage terminations.[14] These Circuit decisions do not, however, reflect a conflicting analysis of a single issue. Rather, these cases demonstrate that deputy sheriffs in different parts of this country have different duties and responsibilities. As a result, some deputy sheriffs occupy positions for which political affiliation is an appropriate prerequisite, while others do not.

This point is illustrated through a comparison of the Circuits' discussions of the nature of the positions of deputy sheriff in the states in which their cases arose. For example, as was stated previously, the Eleventh Circuit in *Terry v. Cook* found that, in Alabama, deputy sheriffs are essentially the "alter ego" of the sheriff, and are therefore subject to dismissal for political reasons.[15] In doing so, however, the court noted that the positions of clerk, investigator, dispatcher, jailer and process

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14. The Seventh and Fourth Circuits have found that deputy sheriffs in Illinois and North Carolina, respectively, are subject to dismissal on this ground. *See Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991). The Third, Fifth, Sixth and Tenth Circuits have found that deputy sheriffs in Pennsylvania, Texas, Tennessee and New Mexico, respectively, are not. *See Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015, 1023 (3rd Cir. 1992); *Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); *Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979) (pre-*Branti*).

15. 866 F.2d at 377.

server which, in Alabama, are not among those classified as deputy sheriffs, may not be subject to political patronage dismissals.[16]

Compare these findings to those that supported the decision of the Third Circuit in *Burns v. County of Cambria, Pennsylvania.* There, the court found that deputy sheriffs in the Cambria County Sheriff's Office "primarily perform three tasks: they serve process; they transport prisoners to court and between facilities; and they provide security for courtrooms." [17] The court further noted that there was no basis to find that "the sheriff himself performs any policy making function or that he relies on his deputies for any policy-type duties."[18]

Obviously, the descriptions of the duties inherent to the position of deputy sheriff in Alabama and Cambria County, Pennsylvania are extremely varied. In fact, it appears that deputy sheriffs in Cambria County have more in common with Alabama's process servers and jailers than they do with Alabama's deputy sheriffs. Thus, while, on the surface, both the Eleventh and Third Circuits considered the question of whether a position titled "deputy sheriff" is subject to termination for political reasons, the suggestion that these Circuits addressed identical factual issues, and that their legal conclusions are conflicting, is ludicrous.

Therefore, as no conflict between the Circuit Courts of Appeal has been identified, Petitioners have not demonstrated the need for review by this Court.

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16. *Id.* at 378.

17. 971 F.2d at 1022.

18. *Id.* at 1023.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied by this court.

Respectfully submitted,

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